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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 - - - - - x

5 In the Matter of:

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7 SEARS HOLDINGS CORPORATION,

8

9 Debtor.

10 - - - - - x

11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 February 7, 2019

17 9:27 AM

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20

21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: NAROTAM RAI

Page 2

1 HEARING re Evidentiary Hearing

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25 Transcribed by: Sonya Ledanski Hyde

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1 MR. SCHROCK: That's why I'm here.

2 THE COURT: You were going through the sale  
3 process and the conduct of what people have referred to as  
4 the auction here. One of the provisions of the sale  
5 procedures order, all of which are waivable in the exercise  
6 of fiduciary duties, is to require qualified bidders to  
7 provide an allocation of what they're -- what assets they're  
8 paying what for. It's uncontested that ESL did not do  
9 that. I have traditionally viewed --

10 MR. SCHROCK: We waived it, Your Honor.

11 THE COURT: You waived that condition?

12 MR. SCHROCK: We did.

13 THE COURT: I have viewed that condition which  
14 appears in sale orders generally as serving the purpose of  
15 letting a seller, the Debtor, and its constituents value a  
16 global proposal as against piecemeal proposals so that you  
17 can slice and dice the auction to see whether some  
18 combination of bids will equal a global bid or a reduced  
19 global bid.

20 It also, though, does have the benefit of giving  
21 you the Debtors' -- giving you the buyer's viewpoint of what  
22 the -- when the buyer's a credit bidder -- of what the  
23 unencumbered assets are. But maybe you can just tell me,  
24 why did you waive it here?

25 MR. SCHROCK: Your Honor, at the end of the day,

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1 we didn't have qualified bids for even sections of the  
2 business and when we looked at this in total, and given that  
3 the structure of the auction was going to be comparison of  
4 the Debtors looking at a going concern versus a winddown,  
5 while we did have some indications from ESL around  
6 allocations and a view, we had to take -- and I think it's  
7 fair to take -- we took a global view as to what  
8 consideration was being provided to the company and we  
9 understood that the entire business would have to be valued  
10 as a whole.

11 But given that we didn't have any particular bids  
12 or qualified bids for particular divisions, that wasn't as  
13 much of a concern for the company.

14 THE COURT: Okay.

15 MR. SCHROCK: So the benefits of the sale  
16 transaction really do significantly outweigh an orderly  
17 windown. And, Your Honor, I know there's been press around  
18 the Debtors' severance obligations and what we were doing.  
19 I do want to make clear for the record that under either  
20 scenario, the Debtors were honoring severance obligations.  
21 Those claims are administrative claims in these cases under  
22 governing Second Circuit -- Second Circuit precedent.

23 We deliberately made sure that -- and it was one  
24 of the primary purposes around having the windown, to make  
25 sure we could pay severance claims. But we are entitled to

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1 take into account in turning a highest or best offer, not  
2 just the economic points. And people make light of it, but  
3 there's 45,000 people out there that are working for this  
4 company, and it matters. These people will have jobs. As a  
5 going concern, we've got uncontroverted testimony from Mr.  
6 Kamlani about the steps that they're taking with this  
7 business plan.

8 This business plan is being financed by major  
9 commercial banks. They and we are true believers in a going  
10 concern for sales -- for Sears, rather. In a winddown,  
11 we're going to lose all those jobs. With the exception of  
12 probably a few stores and perhaps in Guam, Puerto Rico where  
13 there, you know, have some highly profitable operations, we  
14 would have to GOB them and we'd see that certain businesses  
15 could be possibly be sold in divisions, in parts.

16 But, Your Honor, this truly is -- like many  
17 retailers, it's a melting ice cube and the timing is so  
18 urgent, and we saw that even with the Services.com purchase  
19 of Parts Direct, which ended up with them not closing.  
20 We're now going to end up having to argue with them around  
21 the return of the deposit. But we saw, and we believe the  
22 evidence is uncontroverted, that there were significant  
23 risks around the windown.

24 The protection agreement liabilities are going to  
25 be honored in a sale transaction. In a windown, they would

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1 very likely be rejected unless we could find somebody to  
2 take those liabilities and basically sell that part of the  
3 business for zero or negative value.

4 THE COURT: Well, while we're on this subject of  
5 the protection of the warranty, the protection agreements,  
6 there was some discussion yesterday about the risk that  
7 there would be a delay in the approval of the KCD --

8 MR. SCHROCK: Yes.

9 THE COURT: -- transfer. I think your  
10 announcement of the PBGC resolution somewhat ameliorates  
11 that or more than somewhat, but you still have to go to a  
12 third party to get approval. How is the risk allocated  
13 pending that approval?

14 MR. SCHROCK: So, Your Honor, we've handled that.  
15 If you take a look at Slide 27, section -- this is handled  
16 in Section 2.8B of the Asset Purchase Agreement which states  
17 that from the closing date until such time as the transfer  
18 of the KCD notes and the assumption of purchase agreement  
19 liability occurs, the buyer provides services to the  
20 applicable sellers sufficient to enable the sellers to  
21 perform the purchase agreement liabilities and in  
22 consideration for such services, the sellers are paying to  
23 the buyer an amount equal to the aggregate amounts paid by  
24 buyers or sellers with respect to any licenses which buyers  
25 license as the KCD IP.

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1                   THE COURT: Okay. Is that the line going out the  
2 door there?

3                   MS. LIEBERMAN: Hopefully not going out the door,  
4 Your Honor.

5                   THE COURT: Okay.

6                   MS. LIEBERMAN: Good afternoon, Your Honor. Donna  
7 Lieberman from Halperin Battaglia Benzija.

8                   Your Honor, we represent Paul Ireland, the  
9 administrator of the estate of James Garbe. The objection  
10 that we filed as at Docket Number 1931, and it's a fairly  
11 discrete objection, Your Honor. Although, as you can  
12 imagine, it's one that's very important to our client.

13                  Your Honor, the objector as well as the United  
14 States of America holds a mortgage against one piece of  
15 Sears real estate. That piece of real estate is identified  
16 by the Debtors as 8975. It is listed on APA Schedule  
17 1.1(p), the operating owned property. So it is presumably a  
18 piece of real estate that the Debtors wish to convey to the  
19 buyer.

20                  The objection is very simple, Your Honor. The  
21 mortgagees have a perfected first lien mortgage on this  
22 property. The Court may recall that we actually filed a  
23 limited objection to the DIP motions in connection with  
24 this. My colleague, Mr. Halperin, argued that -- and both  
25 of the -- both the final DIP orders have specific language

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1 about the fact that this mortgage is not primed. Nobody is  
2 pari passu with this mortgage lien.

3 Your Honor, the face amount of the mortgage note  
4 is \$17.4 million. There is a provision in the mortgage note  
5 and the related documents for a small amount of annual  
6 interest as well as a provision for professional fees. I'm  
7 sure the Court will not be surprised, as we state in our  
8 objection, we do not consent to the sale of our collateral.  
9 We want to know that if this -- if this mortgage is not  
10 going to be paid at closing that the amount -- that the  
11 amount of the mortgage, which we've calculated and we've  
12 given the Debtor the precise number, that that amount is  
13 segregated and reserved.

14 THE COURT: Okay.

15 MS. LIEBERMAN: And obviously the second piece is  
16 if we cannot reach agreement with the Debtor about the value  
17 of the collateral that either party can bring that issue to  
18 this Court on motion.

19 THE COURT: Okay. So what is the Debtor's  
20 proposed treatment of this -- through the sale? I mean,  
21 obviously the Lender is entitled to adequate protection of  
22 its interest in the property.

23 MR. SINGH: That's right, Your Honor. We have --

24 THE COURT: State your name, please.

25 MR. SINGH: Sorry. Sonny Singh, Weil, Gotshal on

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1 behalf of the Debtors, Your Honor.

2 I think we've got a very narrow issue here. The  
3 valuation reservation of rights, I think we have no problem  
4 with that. If we have to come back later and deal with  
5 that, we can. And our position simply is that under 363(f),  
6 their liens get to attach to the proceeds of sale, excuse  
7 me, which -- right here, as Your Honor knows, the  
8 transaction is primarily assumptions of liabilities, which  
9 are the proceeds that are coming in. There're no other  
10 liens on this asset, so whatever those proceeds may be we'll  
11 have to fight about another day with the objecting party,  
12 but there's no basis to -- they haven't traced -- There's no  
13 basis to say we set aside \$17.8 million of cash that's just  
14 sitting aside in the company's --

15 THE COURT: Well, I think you need to give them an  
16 adequate protection lien on assets then. I mean, I don't  
17 know how -- they're actually protected otherwise.

18 MR. SINGH: I believe under the DIP order -- so,  
19 Your Honor, as long as it's not against a particular asset,  
20 right, and we don't have to --

21 THE COURT: But they have a super priority that --  
22 where they're actually covered then. I think that's --

23 MR. SINGH: Right, which --

24 THE COURT: And then you can litigate what the  
25 actual value was and what you're entitled to be paid.

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1 MR. SINGH: And, Your Honor, I think we would be  
2 fine with that because that doesn't require any segregation  
3 of whatever funds they're asserting.

4 THE COURT: Okay.

5 MR. SINGH: We have no problem with that.

6 THE COURT: All right.

7 MS. LIEBERMAN: Your Honor, as you can imagine,  
8 our only concern is that once the value is set that we know  
9 that the money is there and available --

10 THE COURT: Right.

11 MS. LIEBERMAN: -- for our client.

12 THE COURT: Okay.

13 MS. LIEBERMAN: Because we have been hearing a  
14 great deal about competing claims --

15 THE COURT: Right.

16 MS. LIEBERMAN: And whether this is an  
17 administratively solvent estate.

18 THE COURT: All right. So I vaguely remember the  
19 carveout in the DIP order. But, I mean, this is a first  
20 lien on this property. It's worth what it's worth, and it  
21 can't be paid just by a, you know, just saying we're going  
22 to pay you someday. They need to have a -- indubitable  
23 equivalent in something. So --

24 MR. SINGH: Yes, Your Honor.

25 THE COURT: -- you need to give them that to them.

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1 MR. SINGH: I think we could probably add a short  
2 paragraph to specifically give the adequate protection lien  
3 that Your Honor outlined --

4 THE COURT: Okay.

5 MR. SINGH: -- relating to -- with everybody's  
6 rights reserved as to the underlying claim.

7 THE COURT: As to the value and either party's  
8 right to --

9 MR. SINGH: And value.

10 THE COURT: -- bring the -- bring that issue to  
11 the Court.

12 MS. LIEBERMAN: Thank you, Your Honor.

13 MR. SINGH: Exactly. Thank you, Your Honor.

14 THE COURT: Okay.

15 MR. FONG: Good afternoon, Your Honor. Chris Fong  
16 from Nixon Peabody on behalf of US Bank in its capacity as  
17 the KCD indenture trustee.

18 THE COURT: Yes.

19 MR. FONG: We don't have any objection to the  
20 sale. I just rise with respect to a discrete issue that we  
21 have with the sale documents with which we would like to  
22 reserve our rights.

23 I think, as you know, US Bank is the indenture  
24 trustee under indenture with KCDIP, a non-debtor subsidiary.

25 THE COURT: Right.

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C E R T I F I C A T I O N

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3 I, Sonya Ledanski Hyde, certified that the foregoing  
4 transcript is a true and accurate record of the proceedings.

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Sonya  
6  
7 Ledanski Hyde

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